

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1276

To be argued by
JOEL N. ROSENTHAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1276

UNITED STATES OF AMERICA,

Appellee,

—v.—

TON YEW HOM,

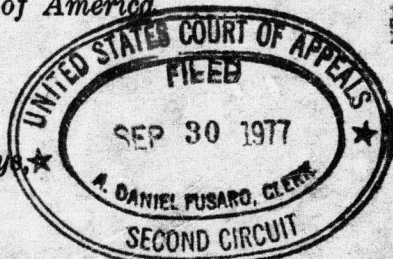
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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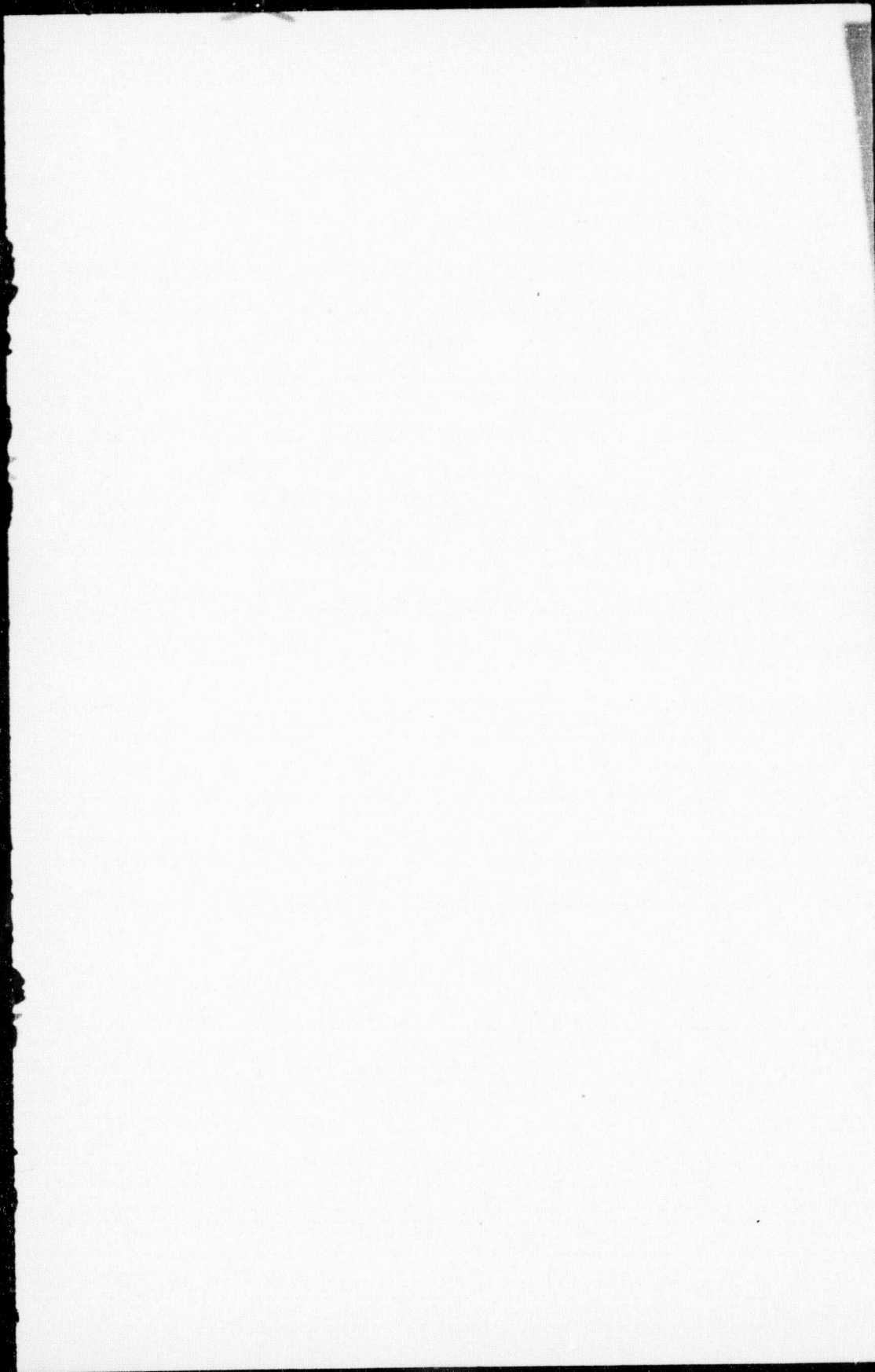


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Appellee,

—v.—

TON YEW HOM,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ton Yew Hom appeals from a judgment of conviction entered on June 16, 1977, in the United States District Court for the Southern District of New York, after a five day trial before the Honorable Morris Lasker, United States District Judge, and a jury.

Indictment 77 Cr. 88, filed February 9, 1977 charged Hom in two counts with distributing and possessing with intent to distribute a total of four ounces of heroin, in violation of Title 21, United States Code, Sections 841 (a) (1) and 841 (b) (1) (A).

Trial commenced on April 21, 1977, and concluded on April 25, 1977, when the jury returned a guilty verdict on both counts.

On June 17, 1977, Judge Lasker sentenced Hom to imprisonment for 18 months on each count to run concurrently, to be followed by three years of special parole. Hom is presently free on bail pending appeal.

Statement of Facts

The Government's Case

The proof at trial established that in August 1975, Special Agent James Kibble of the Drug Enforcement Administration ("DEA") approached Lock Kar Sing ("Lock"), who was then in immigration jail awaiting deportation, to see if he would cooperate with the Government. (Tr. 28).^{*} In English, Kibble told Lock that if he cooperated fully and told the truth, DEA would attempt to stay Lock's deportation. (Tr. 29, 84, 264). Kibble knew, but did not tell Lock, that Immigration was having trouble deporting Lock because they could not obtain the necessary travel documents.^{**} (Tr. 30, 87-88, 101). Lock agreed to cooperate with DEA after Kibble's second visit with him at the immigration detention center. (Tr. 86, 206). Thereafter, Lock was released from immigration custody and began to work with DEA in the fall of 1975. (Tr. 31, 207).

Lock testified that he first discussed narcotics with defendant Hom in December 1975 or January 1976. (Tr. 211, 317). Lock had known Hom for some six or seven years prior to that. (Tr. 209-10). Lock stated that when

^{*} "Tr." refers to the trial transcript; "GX" refers to a Government Exhibit; References to "A" are to other portions of the Appendix; "Br." refers to pages in appellant's brief.

^{**} Lock was an illegal alien from the People's Republic of China. A travel document is a passport or entry visa authorizing entry into the receiving country.

he first asked Hom about narcotics, Hom stated that he had six or seven ounces of heroin. (Tr. 211). Hom agreed to sell #3 heroin* to Lock sometime around February 1976. (Tr. 33, 214). On cross-examination Lock stated that he did not have to persuade Hom to sell heroin and that if Hom were not willing to sell it he would not have sold it. (Tr. 321-32).

A. The First Sale.

Hom agreed to sell Lock one ounce of heroin for \$3,000 on February 29, 1976. Hom insisted that the sale take place inside his apartment at 70 Bayard Street in Chinatown. (Tr. 215). On that date, Lock went to DEA headquarters on 57th Street in Manhattan where he met with Special Agents James Kibble and Jack Toal. All three then proceeded to the vicinity of Chinatown. Lock was searched by the agents, who then placed a Nagra recorder on him. Lock was given \$3,000 in official advance funds to make the heroin purchase, and was then followed to 70 Bayard Street by Agents Kibble and Toal. (Tr. 37, 217, 371). Inside apartment 3 of 70 Bayard Street, Hom gave Lock one ounce of #3 heroin in exchange for the \$3,000. (Tr. 213, 219; GX 2). After the transaction Hom told Lock that he would have more heroin available the next time. (Tr. 220). When Lock left the building he was followed by the agents to a pre-arranged meeting place, where he turned over the heroin and the Nagra recorder. (Tr. 39, 227; GX 1A-C, 2).

B. The Second Sale.

In March 1976, Hom and Lock agreed upon a second heroin transaction. (Tr. 234). Hom asked Lock how

* #3 heroin is commonly known as Chinese brown rock heroin because of its texture and color.

much heroin he wanted and Lock told him three ounces. They agreed that the heroin would cost \$2,800 an ounce and that the sale would take place in Hom's apartment. (Tr. 235).

On March 19, 1976, Lock went to DEA headquarters where he met with Agents Kibble and Toal and then proceeded to the vicinity of Chinatown. Again, Lock was searched by the agents, fitted with a Nagra recorder (Tr. 236) and then followed to 70 Bayard Street by Agents Kibble and Toal. Inside apartment 3 at 70 Bayard Street, Hom gave Lock three ounces of heroin. (Tr. 55, 377; GX 3A-E). Lock then left the building and was followed to the meeting place by Agents Kibble and Toal. Lock gave the heroin to Agent Kibble who searched him and gave him \$8,440 * in official advance funds to pay for the heroin.

The agents then reactivated the Nagra recorder and again followed Lock to 70 Bayard Street. (Tr. 377). Inside the apartment, Hom counted the money and told Lock that there was \$40 too much and that Lock should keep it. In addition Hom gave Lock \$300 for his services. (Tr. 243; GX 5). Lock then left the building and met with the agents who took the \$340 and the Nagra tape recording. (Tr. 245, 378; GX 4, 5).

On the other occasions following those two sales Lock met Hom and attempted to purchase larger amounts of heroin. Hom agreed to continue to sell heroin, but could not provide larger amounts. (Tr. 165). During two of those conversations Lock was wearing a Nagra recorder. The recordings of those conversations evidenced Hom's willingness to continue to sell heroin but not in any

* Agent Kibble was only supposed to give Lock \$8,400, but miscounted and gave him \$40 extra.

larger amounts. During these meetings the two also discussed #4 (or white) heroin, which, Hom finally indicated, he could not supply. (GX 7, 7B, 8, 8B).

C. The Defense Case

The defense re-called Special Agent Jack Toal and Shirley Moy, a Chinese interpreter, as defense witnesses. Toal testified in substance substantially as he had as a government witness. (Tr. 369-395, 408-411). Shirley Moy, who was also a Government witness, testified that in her opinion one of the voices on Government Exhibits 2A, 4A, 7A and 8A was identical to the voice exemplar of defendant Hom and that the other voice on those transcripts was that of the informant Lock. (GX 2B, 4B, 7B, 8B, 1D).

D. The Grand Jury.

On February 8, 1977, Special Agent James Kibble was the sole witness in the grand jury that returned Indictment 77 Cr. 88. Kibble testified concerning his own observations, as well as what Lock had told him, concerning the two sales charged in the indictment. At the beginning of Kibble's testimony, the grand jury was specifically informed that some of his testimony was hearsay in nature and that the grand jury could request an appearance by the witnesses with direct knowledge of the facts. During the trial, testimony was elicited that while an interpreter was used on occasion, Kibble communicated with Lock in English. (Tr. 84, 127, 142-44, 162, 256, 264, 267-68). Judge Lasker, in denying a post-trial motion to dismiss the indictment, specifically found that Special Agent Kibble communicated with Lock in English. (Tr. 530).

A R G U M E N T

POINT I

Hom's Predisposition To Sell Heroin Was Overwhelmingly Demonstrated.

Hom's claim that the Government failed to prove his predisposition to commit the offenses charged is totally without merit. Upon this record, the jury correctly concluded that the Government met its burden and proved that Hom was ready, willing and able to sell drugs to the informant.

Relying upon the fact that the informant, Lock, solicited Hom to sell him drugs, Hom sought and received an entrapment charge. *United States v. Martinez-Carcano*, 557 F.2d 966 (2d Cir. 1977). Although not specifically addressed by either side during summations, the evidence * at trial clearly carried the Government's burden of showing the defendant's predisposition beyond a reasonable doubt. *United States v. Rosner*, 485 F.2d 1213, 1221 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Koss*, 506 F.2d 1103, 1112 (2d Cir. 1974), *cert. denied*, 420 U.S. 977 (1975); *United States v. Steinberg*, 541 F.2d 510 (2d Cir. 1977).

Proof of Hom's predisposition consisted, *inter alia*, of his two separate sales of heroin to Lock of quantities of 1 ounce and 3 ounces, for \$3,000 and \$8,400, respectively, and his repeatedly expressed willingness to continue to sell heroin to Lock, as testified to by Lock and as reflected in the transcripts of their tape-recorded conversa-

* The evidence, of course, must be viewed in the light most favorable to the Government; *United States v. Goldberg*, 527 F.2d 165, 168 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Leonard*, 524 F.2d 1076, 1081 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

tions. On the second sale, Hom paid Lock a commission of 300 dollars; hardly the conduct of a neophyte in the narcotics trade. Moreover, Lock's testimony in response to defense counsel's questions stands uncontradicted that Hom never expressed any hesitation about selling heroin—he needed no persuasion. (Tr. 321-22).

Hom's present claim that he "submitted" to Lock only after Lock engaged in a "two month campaign of seduction during which [Lock] invoked his six-year friendship", is based entirely upon one ambiguous response by Lock in which he acknowledged that he talked with Hom about buying heroin on a number of occasions before he was able to purchase the first ounce. (Tr. 321). The inferences Hom would now draw from this statement are unsupported by the record; in fact, it is clear that the only reason Hom did not sell heroin to Lock before February 19, 1976 is because he did not have it to sell, and not because he was unwilling to do so. This is apparent both from Lock's testimony (Tr. 211-212) and from Hom's own later statements about additional transactions, contained on the transcripts of the tape recordings between the two men. (GX 7B, 8B). Utterly lacking on these transcripts is any reluctance on Hom's part to sell heroin. What is apparent is a reluctance by Hom to give up his sources so Lock might purchase heroin directly, a reluctance to sell more than a certain quantity at one time for fear of being cheated, and an unqualified willingness to sell drugs to Lock so long as his supply of heroin continued. (GX 7B, 8B).

These facts refute Hom's claim that he was dragged into selling heroin by Lock, and establish instead both an existing course of criminal conduct as well as Hom's ready response to Lock's inducement to sell heroin. *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir. 1971). Judge Lasker correctly rejected Hom's claim (Tr. 528-29) that the jury was not justified in concluding that the Government had proven predisposition

beyond a reasonable doubt. On appeal, as this Court has constantly reiterated, the sole question is whether the evidence was sufficient to allow the jury to conclude that the defendant was predisposed to commit the crime. *United States v. Steinberg, supra*, 551 F.2d at 514; *United States v. Ordner*, 554 F.2d 24, 28 (2d Cir. 1977). Thus, even aside from the utter implausibility of a claim of entrapment in a case involving amounts of heroin of this magnitude, cf. *United States v. Ortega*, 471 F.2d 1350, 1357-58 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973), there are simply no grounds for this Court to overturn the determination of the "twelve jurors who saw and heard the witnesses and saw the defendants throughout the . . . trial [and who] are far better judges of the facts than we who sit in a more rarified atmosphere reading a black and white appellate record." *United States v. Steinberg, supra*, 551 F.2d at 514.

POINT II

The Grand Jury Proceedings Were Proper; The District Court Properly Rejected Hom's Motion To Dismiss The Indictment.

Hom's argument that the grand jury was misled when it heard the agent's testimony has no merit. The district judge evaluated this claim after reviewing the grand jury testimony and hearing the agent and informant testify at trial, and found that the grand jury was properly instructed and not misled when the agent testified that he had communicated with Lock in English. The District Court's findings should not be disturbed unless clearly erroneous, *United States v. Cirillo*, 554 F.2d 54 (2d Cir. 1977), which they are not.

Hom claims that Lock and Agent Kibble did not speak to each other "in the same language" (Br. 12), and,

therefore, the grand jury was misled when Kibble testified that he had learned from Lock that it was Hom who had sold the narcotics to him. Relying upon *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), Hom urges that, under these circumstances, the indictment must be dismissed despite the Assistant United States Attorney's explicit instruction to the grand jurors that Kibble's testimony was largely hearsay. Hom claims that Kibble's testimony was "double hearsay" because Lock and Kibble employed hand gestures as well as broken English to communicate with each other.

While we do not believe that *Estepa* reaches so far * as to mandate that grand juries be instructed that hearsay testimony they are hearing be qualified as "double" or "triple," or that they be told that the witness learned what he did through an interpreter translating for the actual participant, rather than from the participant directly, Judge Lasker assumed that it does, and nevertheless rejected Hom's claim. He based his findings upon the testimony of Kibble at trial and his evaluation of his credibility. (Tr. 530). Additionally, he was entitled to consider Lock's testimony, which corroborated Kibble's, that the two men spoke in broken English and with sign

* The vice at which *Estepa* was directed did not occur here; Lock's trial testimony did not differ in any significant respect from what Kibble told the grand jury; the grand jury would have indicted regardless of whether Lock or Kibble testified. See *United States v. Marchand*, Dkt. No. 77-1131, slip op. 5391, 5426 (2d Cir., Aug. 22, 1977); *United States v. Harrington*, 490 F.2d 487, 489-90 (2d Cir. 1973); *United States v. Olsen*, 406 F.2d 927 (2d Cir.), cert. denied sub nom. *Leach v. United States*, 406 U.S. 927 (1972).

language. (Tr. 267-68).^{*} The court's finding that the grand jury was not misled was amply supported by the record and should not be disturbed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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^{*} The only evidence tending to support Hom's present claim is Lock's response to defense counsel's question in English. (Tr. 269). Review of that testimony indicates that the conclusion that Hom did not *hear* the question is equally as appropriate as the conclusion that he could not comprehend the English. Moreover Lock's "inability" to answer defense counsel's question may well have been the result of his understandable fear of being trapped by a question in a language in which he was, concededly, not proficient.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Joel N Rosenthal being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the *30th* day of *September, 1977* he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

*Barry Bassis, Esq.
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Room 509
U.S. Courthouse
Foley Square,
New York, N.Y. 10007*

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

30th day of *September 1977*

Gloria Meyer

GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
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